

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
David J. Zinman & Mary I. Zinman : AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1973, 1974, 1975, :
1979, 1980 & 1981. :
:

State of New York :

ss.:

County of Albany :

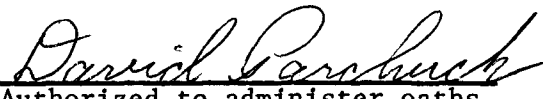
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon David J. Zinman & Mary I. Zinman the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

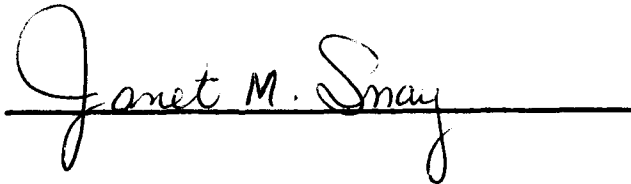
David J. Zinman & Mary I. Zinman
c/o Boylan, Brown, Code, et al
900 Midtown Tower
Rochester, NY 14604

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
15th day of September, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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David J. Zinman & Mary I. Zinman : AFFIDAVIT OF MAILING
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State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he served the within notice of Decision by certified mail upon Howard Konar, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard Konar
Boylan, Brown, Code, Fowler, Randall & Wilson
900 Midtown Tower
Rochester, NY 14604

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of September, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 15, 1986

David J. Zinman & Mary I. Zinman
c/o Boylan, Brown, Code, et al
900 Midtown Tower
Rochester, NY 14604

Dear Mr. & Mrs. Zinman:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Howard Konar
Boylan, Brown, Code, Fowler, Randall & Wilson
900 Midtown Tower
Rochester, NY 14604

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
DAVID J. ZINMAN and MARY I. ZINMAN	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1973, 1974, 1975,	:	
1979, 1980 and 1981.	:	

Petitioners David J. and Mary I. Zinman, c/o Boylan, Brown, Code, Fowler, Randall & Wilson, 900 Midtown Tower, Rochester, New York 14604, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1973, 1974, 1975, 1979, 1980 and 1981 (File No. 46655 and 46656).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on August 1, 1985 at 11:00 A.M., with all briefs and a stipulation to be submitted by June 13, 1986. Petitioners appeared by Boylan, Brown, Code, Fowler, Randall & Wilson (Howard Konar, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether, during the years in issue, petitioner David J. Zinman was domiciled in New York and, within any period of 548 consecutive days, was not present in a foreign country for at least 450 days, was present in New York for more than 90 days and maintained a permanent place of abode in New York at which his spouse and minor children were present for more than 90 days.

II. Whether penalties imposed pursuant to sections 685(a)(1), 685(a)(2), 685(b) and 685(c) of the Tax Law should be waived.

FINDINGS OF FACT

1. Petitioners, David J. and Mary I. Zinman, filed New York State income tax nonresident returns for the taxable years 1979, 1980 and 1981. No returns for the years 1973, 1974 and 1975 had been filed prior to the hearing.

2. On June 13, 1983, the Audit Division issued three notices of deficiency against petitioners as follows:

<u>Years</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1973-1975	\$11,506.54	\$6,040.94	\$8,382.19	\$25,929.67
1979-1981	35,783.76	251.04	8,560.45	44,595.25
1979-1980	237.74	-0-	66.97	304.71

For the years 1973 through 1975 the Audit Division imposed penalties pursuant to sections 685(a)(1), 685(a)(2) and 685(b) of the Tax Law. For the years 1979 through 1981, the Audit Division imposed penalties pursuant to section 685(c) of the Tax Law.

3. On February 23, 1983, petitioners executed a consent fixing the period of limitation upon assessment of income tax for the year ended December 31, 1979 at April 15, 1984.

4. The basis of each of the deficiencies was the Audit Division's assertion that petitioners were domiciled in New York and thus subject to tax as residents.

5. Petitioner¹ was born in New York City. He attended undergraduate school at Oberlin in Ohio. In March of 1958, petitioner married his first wife, Leslie Heyman, in Atlanta, Georgia. After graduating from Oberlin College later that year, petitioner went to the University of Minnesota to work as a teaching assistant and to obtain his Master's Degree in music. Petitioner remained studying and teaching at the University of Minnesota until 1961.

1 All references to petitioner will be to petitioner David Zinman only.

6. During the years 1958 to 1961, petitioner thought of Georgia as his home, although he lived in Minnesota. He had returned to New York State in 1956 when his mother died, and after that time had occasionally visited his father in New York. He maintained no financial or other ties whatsoever with New York State during that period. Most of his summers and other holidays were spent in Atlanta, Georgia with his wife's family, with whom petitioner was very close. His father-in-law was Vice President of the Trust Company of Georgia, and helped put petitioner through graduate school. While in Georgia, petitioner obtained a Georgia driver's license and executed a will naming his father-in-law as executor. Although petitioner had little or no income, his wife was a beneficiary of a Georgia trust, and maintained Georgia bank accounts and filed tax returns as a Georgia resident.

7. Petitioner obtained his Master's Degree from the University of Minnesota in 1961. In September of that year, he traveled to London, England, to accept a position as assistant to Pierre Monteux, who had recently been appointed Conductor of the London Symphony Orchestra. Petitioner's wife was pregnant with their first child at that time and remained in Georgia with her family. Their first child was born in Atlanta in December of 1961. Petitioner's wife and child joined him in London the following March. During the next two years, petitioner traveled around the world with Monteux and the orchestra. His family rented a succession of apartments in London for periods of six or seven months at a time. Petitioner's position with Monteux was essentially that of apprentice; Monteux employed him at will and paid him a small income out of his own pocket. Throughout this period, petitioner continued to receive support from his wife's family, and he continued to spend his holidays and vacations with his wife's family in Georgia.

8. At the 1963 Holland Festival, petitioner came to the attention of European audiences and musicians when, at the age of 25, he conducted a series of very successful concerts in place of another conductor who had become ill. He was immediately offered a management contract and the following year he was appointed guest conductor of the Netherlands Chamber Orchestra, ("NCO") and he moved with his family to Amsterdam. Soon thereafter, he was appointed Music Director of the NCO.

9. Petitioner's appointment to the NCO was a significant first step in his career. The NCO enjoyed an international reputation and toured throughout the world. The position of Music Director was a full-time job, requiring petitioner to assume full responsibility for artistic planning, hiring and firing of musicians, and conducting between 30 and 40 concerts per season. Petitioner's job as Music Director of the NCO was a civil service position in the Netherlands. Although by its terms his contract with the NCO was renewable from year to year, his status as a civil servant essentially guaranteed him tenure after his second year with the orchestra. Petitioner remained with the NCO for thirteen years until he resigned to take a position with the Rotterdam Philharmonic.

10. As a civil servant of the Netherlands, petitioner was covered under the State Welfare Pension Fund, which provided him with full health and retirement benefits. Due to the fact that he was steadily employed in the Netherlands for almost twenty years, his retirement benefits there were fully vested. At age 65, petitioner will be entitled to receive 80 percent of his last salary in the Netherlands, the top-level pension provided to Dutch civil servants.

11. When petitioner first moved to the Netherlands, he lived with his family in an apartment in Amsterdam. In 1966, when his second child was born, petitioner moved with his family to Blaricum, a suburb of Amsterdam, and rented

a home there. In 1971, petitioner purchased a home in Laren, another suburb of Amsterdam. During the period from 1964 to 1972, both of petitioner's children attended public schools in the Netherlands. Both children are fluent in Dutch, as is petitioner.

12. As a foreign national working in the Netherlands, petitioner was required to obtain a labor permit and to renew it each year. After petitioner had worked in the Netherlands continuously for five years, he asked the NCO to apply for a permanent labor permit on his behalf. This permit was granted in 1970 and entitled petitioner to work in the Netherlands at any time for the rest of his life. Petitioner also obtained a driver's license in the Netherlands that he uses to the present day.

13. Petitioner filed tax returns during these years as a Dutch resident, paying income tax to the Dutch government based upon his worldwide income. Throughout the period 1964 to 1972, petitioner had no professional or financial contacts with the United States aside from guest appearances with American orchestras. On one or two occasions, he guest conducted in New York City and visited his father there, and he occasionally visited with his wife's family in Georgia. During these nine years petitioner regarded the Netherlands to be his home.

14. As a result of guest conducting with the Rochester Philharmonic Orchestra, petitioner was appointed Music Advisor for the 1973-1974 season and Music Director for the 1974-1975 and 1975-1976 seasons. His contract with the Rochester Philharmonic required petitioner to be present in Rochester for four weeks during the first season and for sixteen weeks during each of the following two seasons. The contract was periodically renewed, and he retained the position of Music Director throughout the years at issue. During his first

year as Music Advisor in Rochester, petitioner stayed at a local hotel. At the start of the second season in September 1974, he purchased a house in Rochester. Petitioner purchased the house at the urging and with the assistance of the orchestra Board of Directors who wanted to convey the impression of stability after a long period of turbulence for the orchestra, and wanted petitioner to have a place for entertaining while in the city. Petitioner was also motivated to purchase the house as a residence for his father, who at that time was elderly and in poor health. Finally, the house provided petitioner with a convenient place to store separate sets of music and clothing for his use while in Rochester, and afforded petitioner a convenient place to stay while working in the city. After purchasing the house in Rochester, petitioner opened bank accounts in the city and bought a car. Petitioner never obtained a New York driver's license, nor did he ever receive coverage under any health or retirement plans from the Rochester Philharmonic. In contrast to the salaried position he held in the Netherlands, petitioner was compensated from the Rochester Philharmonic as an independent contractor.

15. When petitioner began working with the Rochester Philharmonic in 1973, his tenure as Music Director of the NCO continued without interruption. His position with the NCO was far more lucrative and prestigious than his position in Rochester. According to petitioner, it is common practice among conductors to hold directorships with two or more orchestras simultaneously as a means to supplement their income and increase their exposure. Petitioner's primary purpose in accepting the appointment in Rochester was to establish a presence in the United States by which other orchestras could observe his performance and through which he could obtain more guest appearances in America.

16. During 1973, petitioner separated from his first wife and sold his home in Laren. In the following year, he obtained a divorce from his first wife in a Netherlands court as a resident of the Netherlands. Petitioner was required to appear in court several times during the proceedings, and the terms of the divorce agreement were decided in accordance with Dutch law. Under the divorce decree, petitioner's wife obtained custody of their two children. In 1974, petitioner was married to Mary Ingham, an Australian national. Their first child was born in Amsterdam in 1976. Their child attended nursery school in the Netherlands and like petitioner's two other children, speaks Dutch fluently.

17. In 1975, with the assistance of the NCO, petitioner applied for and received permanent permission to reside in the Netherlands. Prior to that time, he had to renew his residence permit each year. Permission to reside in the Netherlands is granted only to long-term residents who state that they intend to remain in the Netherlands indefinitely. The permit entitled petitioner to purchase a home and reside in the Netherlands at any time for the rest of his life.

18. In 1977, petitioner resigned his position with the Netherlands Chamber Orchestra and accepted an appointment as Principal Guest Conductor of the Rotterdam Philharmonic Orchestra. The Rotterdam Philharmonic is rated the number two orchestra in the Netherlands, and the appointment was a step up for petitioner both in terms of salary and prestige. In 1979, petitioner was appointed Music Director of the Rotterdam Philharmonic under a three-year contract, and he moved to Rotterdam with his family. Both of his posts with the Rotterdam Philharmonic were civil service positions and he retained all benefits received while with the NCO.

19. Throughout the period from 1973 to 1981, petitioner consistently earned far more from his positions in the Netherlands than from his position in Rochester, and he continued paying income tax as a resident of the Netherlands at very high rates. The Netherlands continued to be the focus of his professional career and financial affairs. He continued to retain Dutch management for his professional affairs and a Dutch financial advisor for his financial matters. From 1973 to 1981, petitioner was present in New York State less than 90 days.

20. When the term of petitioner's contract with the Rotterdam Philharmonic expired in August 1982, he decided not to renew it. His decision was based on three factors. First, he was dissatisfied with management policies of the orchestra that, in his opinion, gave too much control to player committees. Second, his son was six years old, and petitioner decided that he wanted him to be educated in the United States. Third, in that year, the Rochester Philharmonic gave petitioner an increased commitment both in terms of additional funding for the orchestra and for a large increase in compensation. Petitioner entered into a contract with the Rochester Philharmonic under which his pay, which had previously increased by \$4,000 increments each year, jumped \$13,000 from \$68,000 to \$81,000. In return, petitioner promised the Rochester Philharmonic an increased commitment in time devoted to the orchestra, from 16 weeks to 20 weeks per season.

21. Petitioner moved with his family to Rochester. Petitioner left most of his furniture and household possessions in Rotterdam, however, because he had received another job offer in the Netherlands and was not certain he would remain in Rochester. Once in Rochester, petitioner assumed primary responsibility for caring for his father. His sister, who had lived in the Rochester house while caring for their father, left the house and moved into an apartment of

her own. Petitioner enrolled his son in a private school in Rochester. Beginning in 1982, petitioner retained professionals in Rochester to attend to his financial and management needs and the focus of his life shifted from the Netherlands to Rochester. He regarded Rochester as his home from 1982 until 1985, when he moved to Baltimore with his family to accept an appointment as Music Director of the Baltimore Symphony Orchestra. Beginning in 1982, petitioner filed his income tax returns as a resident of New York State.

22. For the taxable years 1973, 1974 and 1975, petitioner filed federal income tax returns, but did not file New York State income tax returns. Because of his extensive travel and total involvement in his profession, petitioner relied entirely on highly competent advisors for guidance in all aspects of his financial affairs, including compliance with New York and federal tax laws. None of the accountants he retained advised him that he was subject to New York State tax despite his providing them with all the information necessary to make such a determination. Until advised by an auditor of the Department of Taxation and Finance that he had failed to file New York tax returns for 1973, 1974 and 1975, petitioner was not aware of his failure to do so.

23. At the hearing petitioner submitted New York State income tax non-resident returns for the years 1973, 1974 and 1975 indicating income tax due of \$60.00, \$234.00 and \$666.00, respectively, for those years. The Audit Division stipulated that the amounts asserted to be due by petitioner as a nonresident were correct but maintained that the amounts were irrelevant if petitioner were considered to be a resident.

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d)(2) provides that:

"A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time".

B. That "[t]he test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (citation omitted). The evidence to establish the required intention to effect a change in domicile must be clear and convincing." Matter of Bodfish v. Gallman, 50 A.D.2d 457, 458. "To change one's domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a residence in the new locality" (Citation omitted). Id.

C. That petitioner remained a New York domiciliary during the years he attended school in Ohio and Minnesota. Although his first wife retained close family ties with Georgia and petitioner spent holidays and vacations there, such actions do not establish the requisite intent to give up the old and take up a new domicile. Additionally, when petitioner moved to London he did not exhibit the requisite intent to establish a new domicile. However, when petitioner took the position with the NCO and moved to the Netherlands, he did exhibit the intent to establish a new domicile in that country. Not only did petitioner remain in the Netherlands for 20 years, but he took active steps to remain there permanently by obtaining a permanent work permit and residency permit. He paid taxes in the Netherlands, obtained a Dutch driver's license, sent his children to Dutch schools, purchased a house in the Netherlands and acquired many of the benefits of Dutch citizenship including vesting of his

Dutch civil service pension plan. All of these actions combined with a 20 year stay in the Netherlands are not indicative of an intent on petitioner's part to remain away long enough to establish himself as a conductor in anticipation of returning to New York to continue his domicile in this state. Once petitioner had established his Dutch domicile, spending four to sixteen weeks in Rochester and acquiring a residence there was not enough to change that domicile. Therefore, petitioner was not subject to tax as a resident until 1982 when he permanently left the Rotterdam Philharmonic Orchestra and assumed full-time duties with the Rochester Philharmonic Orchestra.

D. That petitioner Mary Zinman, as an Australian national who moved to the Netherlands, never acquired a New York domicile during the years in issue and was also subject to tax only as a nonresident for the years 1979, 1980 and 1981, which tax has already been paid by both petitioners.

E. That with respect to the years 1973, 1974 and 1975, petitioner David Zinman was subject to tax as a nonresident in the amount of \$960.00 as discussed in Finding of Fact "23".

F. That section 685(a)(1) of Article 22 imposes a penalty for failure to file a return on or before the prescribed date (determined by taking into consideration any extension of time granted for filing), unless it is established that such failure is due to reasonable cause and not to willful neglect. Section 685(a)(2) imposes a penalty for failure to pay the amount shown as tax on a return required to be filed on or before the prescribed date (determined by taking into consideration any extension granted for payment); again, the penalty may be waived where the taxpayer demonstrates that the delinquency was due to reasonable cause and not to willful neglect. Section 685(b) imposes a penalty if any part of a deficiency is due to negligence or intentional disregard

of Article 22 or rules or regulations thereunder. This penalty may also be waived for reasonable cause.

G. That under the circumstances presented petitioner's failure to timely file New York State personal income tax returns and to pay the tax required to be shown thereon was due to reasonable cause and not due to his willful neglect. Petitioner retained the services of a respected accounting firm to oversee his business affairs and to file all required returns, and provided them with all information necessary to prepare accurate returns. He thus did "all that ordinary business care and prudence can reasonably demand." Haywood Lumber & Mining Co. v. Commissioner., 178 F.2d 769, 771 (2d Cir 1950); Matter of Roberta Flack, State Tax Commission, August 21, 1985. With respect to the negligence penalty, to escape such penalty on the ground of reliance on the advice of an accountant, petitioner "must be able to show that the accountant reached his decisions independently after being fully apprised of the circumstances of the transactions." Leonhart v. Commissioner, 414 F.2d 749, 750. Again, petitioner did all that could be reasonably expected to insure that all returns were properly filed. Accordingly, all penalties imposed for the years 1973, 1974 and 1975 are waived.

H. That the petitions of David J. and Mary J. Zinman are granted to the extent that the notices of deficiency issued June 13, 1983 with respect to the years 1979, 1980 and 1981 are cancelled and the Notice of Deficiency issued on the same date with respect to the years 1973, 1974 and 1975 is to be reduced to

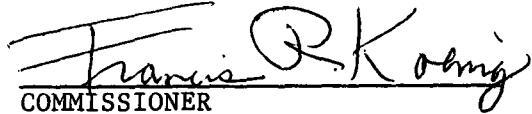
\$960.00 plus interest in accordance with Conclusions of Law "E" and "G"; and
that, except as so granted, the petitions are in all other respects denied.

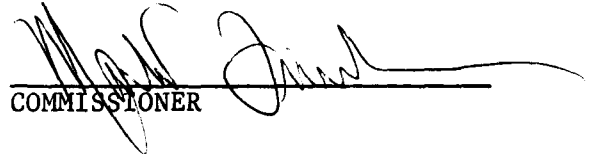
DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER